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Utah Supreme Court

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Robert B. Hansen; Craig L. Barlow; Attorneys for Respondent;

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

VERDEAN ILAS CARTER,

Defendant-Appellant.

Case No.  
15278

ADDENDUM TO BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF THEFT BY  
RECEIVING, ATTEMPTED THEFT BY EXTORTION  
AND BEING A HABITUAL CRIMINAL IN  
THE THIRD JUDICIAL DISTRICT COURT, IN  
AND FOR SALT LAKE COUNTY, STATE OF  
UTAH, THE HONORABLE JAMES S. SAWAYA,  
JUDGE, PRESIDING

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

----- :  
STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

Case No.  
15278

VERDEAN ILAS CARTER, :

Defendant-Appellant. :

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ADDENDUM TO BRIEF OF RESPONDENT  
-----

Respondent submits this supplemental brief on the question relating to the Suppression Hearing transcript in Point II because the Suppression Hearing transcript became available to respondent only after submission of respondent's brief (respondent's brief, p.19).

Parenthetically, although not included in either appellant's or respondent's Statement of Facts, respondent notes that after the jury returned a verdict of guilty on the first two counts against appellant, and was polled, the appellant chose to waive his right to a jury determination of the Habitual Criminal charge. The trial court briefly questioned appellant about the voluntariness of his waiver

and found that he did voluntarily waive the jury for purposes of the third count (Tr.200-201).

POINT II - ADDENDUM

The United States Supreme Court in Clark v. United States, 289 U.S. 1, 77 L.Ed. 993, 53 S.Ct. 465 (1932), addressed an abuse of juror privilege question. The Court decided that a person who became a juror by deliberately concealing a bias from the court and with intent to thwart the prosecution, waived the privilege against disclosure of that juror's conduct in the jury room, which normally is privileged. In reaching this conclusion, the Court analogized privilege to that of attorney and client:

"The privilege [between attorney and client] takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told. There are early cases apparently to the effect that a mere charge of illegality, not supported by the evidence, will set the confidences free (authorities omitted). . . . But this conception of the privilege is without support in later rulings. 'It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud'. . . . When that evidence is supplied, the seal of secrecy is broken." Id., 289 U.S. at 15.

At the Suppression Hearing, appellant moved to suppress the testimony of Mr. Van Sciver relating to the contact appellant had had with him concerning the stolen checks. Mr. Van Sciver was called and testified in substantially the same manner as he later did at trial (Suppression Hearing Tr.4-8). In argument against appellant's motion, the prosecution sought to admit the transcript of an earlier investigative hearing which was convened to determine whether or not Mr. Van Sciver should be required to divulge the name of his client. In that hearing before a different court, that court held no attorney-client relationship existed (Suppression Hearing Tr.18), and ordered Mr. Van Sciver to reveal his client's name. Although the court reserved ruling on the admissibility of this earlier transcript for purposes of appellant's motion (Suppression Hearing Tr.21), it appears that the court did not admit the transcript of the investigative hearing as the court denied appellant's motion without further reference to the transcript (Suppression Hearing Tr.21-22).

Appellant now claims that because the only evidence before the trial court on his motion to suppress was Mr. Van Sciver's testimony, the standard of Clark v. United States, supra, has not been met. Appellant's

contention overlooks the independent existence of the stolen checks themselves. The Clark ruling was intended to protect against the haphazard, erroneous, and even malicious disclosure of otherwise privileged communications. No such danger was presented in this case because the stolen checks were prima facie evidence giving "colour to the charge." Similarly, Rule 26(2)(a) of the Utah Rules of Evidence, as discussed more fully in Respondent's Brief, necessitated a similar showing of corroborative evidence; which was amply supplied by the existence of the stolen checks.

Appellant's position is that these checks did not indicate an ongoing crime but rather a past one. However, when Mr. Van Sciver told appellant that this situation sounded like an extortion plot and the appellant responded, "Well, it is," Mr. Van Sciver was forced to make a decision how he should act. With the stolen checks in front of him, together with the appellant's instructions for him to call the owners, give the owners the checks when they came and then receive their money in return, Mr. Van Sciver quite properly assessed this as an ongoing crime. The

checks corroborated the appellant's admission of the extortion plan.

Respectfully submitted,

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Attorney General

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Attorneys for Respondent



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-vs-

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

- - - - - : - - - - -  
STATE OF UTAH, :  
Plaintiff-Respondent, :  
-vs- : Case No.  
VERDEAN ILAS CARTER, : 15278  
Defendant-Appellant. :

- - - - - : - - - - -  
BRIEF OF RESPONDENT  
- - - - - : - - - - -

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with one count of Theft  
By Receiving, a felony of the second degree, in violation  
of Utah Code Ann. § 76-6-408 (1953), as amended; one count  
of Attempted Theft By Extortion, a felony of the third  
degree, in violation of Utah Code Ann. § 76-6-406 (1953),  
as amended; and with Being An Habitual Criminal, a felony  
in the first degree, in violation of Utah Code Ann. §  
76-8-1001 (1953), as amended.

DISPOSITION IN LOWER COURT

Appellant was tried on the first two counts:  
Theft By Receiving and Attempted Theft By Extortion, before

a jury and was found guilty on both counts on May 19, 1977, in the Third Judicial District Court, the Honorable James S. Sawaya, presiding. A separate hearing was held to determine whether appellant was guilty of Count III on June 8, 1977, at which time the trial court found appellant guilty of Being An Habitual Criminal. On June 8, 1977, the trial court sentenced appellant to serve an indeterminate term of not less than one nor more than fifteen years on Count I; an indeterminate term of not more than five years on Count II; and an indeterminate term of five years to life on Count III; all sentences to be served at the Utah State Prison and all sentences to run concurrently.

#### RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment of the jury at the trial, the judgment of the court on the hearing on Count III, and the sentences imposed as a result of these judgments.

#### STATEMENT OF FACTS

Respondent feels that appellant has adequately stated the facts of the case and would make only the following corrections and additions:

1. Mr. Ward believed that all three calls he received were made by the same man (Tr.25,29).
2. Mr. Nelson received the last call at 11:30

p.m., February 28. It was agreed as a result of this call that delivery was to be made through an attorney (Tr.36).

3. The appellant first talked with Gilbert Athay about his transaction, but eventually called Robert Van Sciver because he could not contact Mr. Athay and because Mr. Athay had run for Attorney General (Tr.146).

4. When appellant went to Mr. Van Sciver's office March 1st, he met Van Sciver in the waiting room where Van Sciver had been standing with his associate, Randall Gaither. Mr. Gaither was "in and about the area" while appellant told Van Sciver to call the person on the checks, to expect someone bringing in money, and to give the checks in exchange for the money (Tr.53,54).

5. Mr. Van Sciver testified he knew the appellant was alone because he saw appellant's car in the parking lot (Tr.62).

5. Mr. Van Sciver was telling appellant he did not like the setup, that it smelled, and so forth in the presence of appellant, and Randall Gaither as they were leaving his office (Tr.56,63,64).

6. Gerald Kinghorn testified that he could recall only one prosecution since the Habitual Criminal Statute was enacted (Tr.206).

7. The Habitual Criminal Statute was enacted in May, 1975 (Tr.206).

9. Mr. Kinghorn testified that the policy of the County Attorney was to use the Habitual Criminal Statute whenever it could be used (Tr.208).

10. The Career Criminal Unit uses seven criteria to identify and prosecute individuals who qualify for Habitual Criminal Status, and he listed most of those criteria (Tr.207).

11. David E. Yocom testified that he reviewed rap sheets and investigations, and concluded only two out of all those prosecuted under the program could have been charged and convicted of being habitual criminals (Tr.214,215,216, 217).

#### ARGUMENT

##### POINT I

UTAH'S HABITUAL CRIMINAL STATUTE, UTAH CODE ANN. § 76-8-1001 (1953), AS AMENDED, IS CONSTITUTIONALLY SOUND.

A. THE STATUTE IS CONSTITUTIONAL ON ITS FACE AND NOT VIOLATIVE OF EQUAL PROTECTION GUARANTEED TO THE STATES UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OR OF UNIFORM OPERATION OF THE LAWS PROVIDED IN ARTICLE 1, SECTION 24 OF THE CONSTITUTION OF THE STATE OF UTAH.

After the appellant was found guilty on the first two counts: theft by receiving and attempted theft by extortion, the trial court in a separate hearing found him



guilty of being an habitual criminal in violation of Utah Code Ann. § 76-8-1001 (1953), as amended. Being an habitual criminal is a status offense, and the habitual criminal statute will apply only upon a conviction of the criminal offense last charged, Zeimer v. Turner, 14 Utah 2d 232, 381 P.2d 813 (1963). Section 76-8-1001 reads as follows:

"Any person who has been twice convicted, sentenced, and committed for felony offenses at least one of which offenses having been at least a felony of the second degree or a crime which, if committed within this state would have been a capital felony, felony of the first degree or felony of second degree, and was committed to any prison may, upon conviction of at least felony of the second degree committed in this state, other than murder in the first or second degree, be determined as a habitual criminal and be imprisoned in the state prison for from five years to life. . . ."

Appellant claims that the legislature's use of the word "may" in the statute gives choice of enforcement which discriminates against him in violation of his right to equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States and of his right to uniform operation of laws as provided in Article I, Section 24 of the Constitution of the State of Utah. Habitual criminal statutes have been employed as an exercise of police power by the states to protect the public from persons whose criminal histories reveal criminal

1002 (1954). A threshold question is whether the Fourteenth Amendment to the Constitution of the United States applies so as to restrict exercise of the police powers of the state. In State v. Beorchia, 530 P.2d 813 (Utah 1974), this Court upheld a statute which made it an offense, inter alia, for aliens to possess or control a dangerous weapon. In concluding that the statute did not violate equal protection, the Court reasoned that the:

" . . . sale, use and possession of firearms are proper subjects of regulation by the State. The Fourteenth Amendment is not generally applied so as to restrict exercise of the police powers of the State. The statute under consideration was directed toward the safeguarding of the public peace and security and is thus a proper exercise of the police powers." Id. at 814, 815. (Emphasis added.).

Respondent submits, preliminarily, that like the statute upheld in Beorchia, Section 76-8-1001 is directed toward the safeguarding of the public peace and security, is a proper exercise of police power, and therefore is not subject to a Fourteenth Amendment equal protection attack.

Beyond this threshold issue, Utah's Habitual Criminal statute withstands constitutional scrutiny under both federal and state guidelines. Generally, courts have upheld habitual criminal statutes so long as they are applied fairly, not discriminatorily enforced, and not

Court considered a statute alleged to be arbitrarily discriminatory. In rejecting the claim, the Court gave a limited reading to the Fourteenth Amendment:

"The Fourteenth Amendment is not to be construed as 'introducing a factitious equity without regard to practical differences that are best met by corresponding differences of treatment. . . A State may make different arrangements for trials under different circumstances of even the same class of offenses.' (See also authorities cited therein.) (Emphasis added.)

The pre-eminent case of Oyler v. Boles, 368 U.S. 448 (1962), held that failure to proceed against other offenders, all within the purview of an habitual criminal statute, does not deny equal protection in the absence of allegation and proof that enforcement selectivity was based on an unjustifiable standard such as race, religion, or other arbitrary classification. In Oyler, the petitioner provided statistical data indicating that 904 men known to be offenders, were not sentenced as required by the statute. Additionally, petitioner claimed that during a fifteen year period six men sentenced to the same court were subject to habitual offender prosecution, yet only he was actually sentenced during this period. In denying petitioner relief, the Court held the evidence did not amount to a denial of equal protection:

". . . the conscious exercise of some selectivity in enforcement

is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it is not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a finding of a denial of equal protection were not alleged." Id. at 456.

Although Oyler did not specifically address the facial constitutional issue, clearly it permitted enforcement selectivity if that selectivity were not based on impermissible grounds.

Various states, however, have specifically addressed the facial issue, generally permitting prosecutorial discretion expressed in the statute. In State v. Troy, 215 Kan. 369, 524 P.2d 1121 (1974), the defendant was sentenced as a second offender of second degree burglary under the Kansas habitual criminal statute. He challenged its constitutionality on the grounds it violated the Due Process and Equal Protection provisions of the Fourteenth Amendment, arguing that the prosecuting attorney could dictate or control the sentence by introducing or withholding evidence of previous convictions. This discretion, he claimed, was an impermissible delegation of authority and was used unfairly as prosecutorial leverage in plea bargaining. The Kansas Supreme Court held that the exercise of reasonable

discretion in the application of the law to those of the same class does not necessarily make the law unconstitutional as depriving one of equal protection. Further, the exercise of discretion without a showing of discrimination does not deprive one of due process or equal protection in a case where an enhanced penalty was imposed.

Similarly, the Supreme Court of Nebraska in State v. Martin, 190 Neb. 212, 206 N.W.2d 856 (1973), rejected an equal protection attack on its habitual criminal statute, emphasizing the inherent necessity of discretion.

Again, in State v. Anderson, 12 Wash.App. 171, 528 P.2d 1003 (1974), the defendant argued the Washington habitual criminal statute provided insufficient safeguards and standards for application of the statute and that it permitted improper selective enforcement. In rejecting his claims, the court noted the defendant failed to make a showing that the statute as applied to him was applied on an "arbitrary and discriminatory basis so as to deny defendant equal protection or due process of law." Id., 528 P.2d at 1005. The court also ruled that there was no unconstitutional delegation of legislative authority. Id.

Accord, Wilwording v. State, 438 S.W.2d 447, 449 (Mo. 1969).

In the case at bar, appellant relies exclusively on State v. Cory, 204 Ore. 235, 282 P.2d 1054 (1955), in support of his contention that the word "may" in Section

76-8-1001 makes the statute constitutionally infirm. Admittedly, the Court in Cory struck down this wording as giving the prosecution too much discretion. However, respondent submits that Cory, a 1955 case, goes against the more recent weight of authority. States which have habitual criminal statutes authorizing prosecutorial discretion generally require the one charged thereunder to show intentional or purposeful discrimination.

In the instant case, appellant has neither alleged nor proved any intentional or purposeful discrimination. Respondent submits the great weight of authority approves statutorily authorized prosecutorial discretion in the area of habitual criminal statute. Express discretion is consonant with the practicalities of prosecution; because these statutes generally include offenses in other states which would be felonies in the home state necessitating prosecutorial leeway in determining the precise nature of the offense, the check on prosecutorial misconduct is prohibition of discriminatory application based on unjustifiable standards.

B. THE STATUTE WAS CONSTITUTIONALLY APPLIED.

As discussed, supra, Oyler v. Boles, 368 U.S. 448 (1962) (and other authorities cited in Point IA), permit some selectivity in enforcement of the habitual criminal statutes, so long as the selectivity standards are not

based on impermissible classifications such as race, religion and so on. Accord, State v. Deddens, 112 Ariz. 425, 542 P.2d 1124 (1975); People v. MacFarland, 540 P.2d 1073 (Colo. 1975); City of Minneapolis v. Buschette, 240 N.W.2d 500 (Minn. 1976). Further, courts have held that conscious selectivity in prosecution is not enough to make application unconstitutional without a discriminatory showing. State v. Andrews, 165 N.W.2d 528 (Minn. 1969); Delaney v. Gladden, 397 F.2d 17 (9th Cir. 1968), cert. denied 393 U.S. 1040.

In the case at bar, appellant has failed to show any selectivity in application of this statute, let alone any impermissible selectivity. In support of his motion to dismiss the habitual criminal count, appellant's attorney called Gerald Kinghorn, Assistant County Attorney, Salt Lake County, who testified that since enactment of Section 76-8-1001 in May, 1975, to the date of the hearing, June 8, 1977, he could recall prosecuting only one person under the statute: the appellant (Tr.203-206). He testified the Career Criminal Unit uses several criteria to determine qualification under the statute (Tr.207), and that the policy of the County Attorney is to use the statute "whenever it can be used, whenever you have access to all of the evidence that is necessary" (Tr.208). Appellant's attorney also called the prosecutor, David E. Yocom, Deputy County Attorney and head of the Career Criminal Program, a federally assisted program organized to identify, investigate, and prosecute individuals who fall within various

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categories (Tr.212,207). Mr. Yocom testified that during the 25 month period the statute had been in effect, two individuals had been charged with being an habitual criminal: appellant and a William Langley. The charges against Mr. Langley were later dropped (Tr.213). He further testified that out of the approximately 260 defendants who had been prosecuted under the program (Tr.213), no persons other than appellant and Langley could have been charged and successfully convicted under the statute (Tr.213,214,215,216). He explained that it is sometimes difficult to ascertain what degree of felony an out-of-state conviction would be in the State of Utah (Tr.216,219).

Appellant was unable to elicit testimony or any other evidence in support of his motion indicating discriminatory selectivity based on unjustifiable standards. Nor did he allege an unjustifiable standard such as those mentioned in Oyler v. Boles, supra. In his brief, appellant cites Yick Wo v. Hopkins, 118 U.S. 356 (1886), in support of his argument, but Yick Wo prohibited discriminatory law enforcement against Chinese owned and operated laundries thereby coming under the invidious classification of race. Appellant does not allege or prove he was discriminated against because he comes within any such classification.



Other cases relied upon by appellant which he claims allow him relief are not directly in point. United States v. Falk, 479 F.2d 616 (7th Cir. 1973); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972); and United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972), are all First Amendment cases. In United States v. Falk, supra, the appellant claimed he had been selected for prosecution not for violation of the law but for punishment of his participation in a draft counseling organization. The trial court had refused an evidentiary hearing on his motion. The Seventh Circuit Court of Appeals reversed, emphasizing the possible chilling effect on First Amendment rights.

Appellant also claimed First Amendment infringement in United States v. Steele, supra. His conviction was reversed after the court determined the record did not support the government's contention the appellant's prosecution was not selective. Although the census official testified that to the best of his recollection only Steele and his three codefendants had refused to cooperate, Steele introduced six other individuals, not prosecuted, who had refused to complete the census forms, but had done so privately.

Finally, in United States v. Crowthers, supra, the Fourth Circuit Court of Appeals held that where the Pentagon had authorized use of a public concourse for religious, recreational and awards assemblies on numerous occasions, it could not prosecute participants in an unauthorized "Mass for Peace." It also ruled that the regulation prohibiting all distribution of leaflets, etc., without prior approval of an authorized official was an unconstitutional First Amendment infringement, noting that the prosecutorial selectivity was plainly grounded on governmental disagreement with the ideas expressed by the accused.

Several factors distinguish the present case. First, no First Amendment rights are involved. Second, the record does not establish that the appellant was singled out for arbitrary, intentional, or purposeful discrimination. Third, appellant introduced no evidence that would justify his claim of intentional or purposeful discriminatory prosecution.

The defendant in State v. Baldondo, 78 N.M. 175, 441 P.2d 215 (1968), made a very similar argument to that advanced by appellant in the instant case. Baldondo argued that the prosecutorial policy of non-enforcement

of out-of-state offenders violated his equal protection rights. In rejecting this claim, the Court concluded the statute applied equally to members of the same class:

"The fact that the statute may not be enforced diligently, does not give rise to a right which would amount to a denial of equal protection.

The allegation of a 'consistent and invariable administrative practice,' innot enforcing the law with respect to habitual offenders uniformly, does not bring this case within the purview of the equal protection clause of the constitution." Id., 441 P.2d at 216, 217.

See State v. Judd, 27 Utah 2d 79, 493 P.2d 604 (1972), wherein this Court held an alleged putative father was not denied equal protection of laws when an action against him was initiated under a procedure criminal in form, although other putative fathers similarly situated were served by less severe civil process.

Respondent submits no showing exists of any impermissible application of the habitual criminal statute.

C. · UTAH'S HABITUAL CRIMINAL STATUTE IS A CONSTITUTIONALLY PERMISSIBLE DELEGATION OF AUTHORITY BY THE LEGISLATURE.

The 1975 Legislature enacted Section 76-8-1001 and 1002. Section 76-8-1001 authorizes some prosecutorial discretion in its enforcement by the inclusion of the word "may". Appellant feels this legislative authorization

constitutes an impermissible delegation of authority and because the habitual criminal statute is an enhancement of punishment and not a crime in itself, discretion as to its application amounts to executive branch encroachment on a strictly legislative prerogative. In reliance thereon, appellant cites State v. Gallion, 572 P.2d 683 (Utah 1977), in which this Court ruled that "elements of a crime and the appropriate punishment therefor are, under our Constitutional system, judgments, which must be determined exclusively by the legislature." Id. at 690. Respondent does not dispute this reading of Gallion, but suggests the case here is not within Gallion's purview. Gallion struck down in part Utah Code Ann. § 58-37-4 (1953), as amended, which authorized the Attorney General, in effect, the power to define a crime and to designate the penalty therefor. Id. at 685.

Unlike the statute in Gallion, the habitual criminal statutes, Section 76-8-1001 and 1002, define the penalty and the procedures for enforcement. Unlike Gallion, the prosecution has no power to define the crime because the habitual criminal provision is not a criminal offense; neither has the prosecution the power to designate penalty because Section 76-8-1001 expressly requires imprisonment from five years to life in the state prison.

Similar challenges have been made against habitual offender statutes with little success. In People v. Mock Don Yuen, 67 Cal.App. 597, 227 Pac. 948 (1924), the Court rejected defendant's claim that the statute was unconstitutional or an unconstitutional delegation of legislative power because a second or subsequent offense could not be punished as a felony unless the indictment or information charged a previous conviction. State v. Anderson, 12 Wash.App. 171, 528 P.2d 1003 (1974): the defendant's claim of improper delegation of authority was struck down. See also State v. Williams, 9 Wash.App. 622, 513 P.2d 854 (1973). Accord, Wilwording v. State, 438 S.W.2d 447, 449 (Mo. 1969):

" . . . The fact that a prosecuting attorney has total discretion to charge under the Act is a legislative delegation of duty as a proper administrative function of that office."

Although the issue appears to be of first impression in Utah, other jurisdictions have considered the validity of the legislative delegation in authorizing prosecutorial discretion under their habitual criminal statutes. The jurisdictions almost unanimously agree in upholding the delegation. Sections 76-8-1001 and 1002 do not permit unbridled discretion as in the State v. Gallion statute. The penalty is clearly fixed under Section 76-8-1001. It is the trier of fact, not the prosecutor,

who determines whether a person is an habitual criminal under the 1975 statute. Respondent submits this habitual criminal statute is a constitutionally permissible delegation of legislative authority.

## POINT II

THE IDENTITY OF THE APPELLANT WAS NOT PROPERLY WITHIN THE TYPE OF COMMUNICATIONS PRIVILEGED UNDER THE ATTORNEY-CLIENT RELATIONSHIP; THEREFORE, THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO SUPPRESS.

When he realized that appellant was asking him to participate in a criminal act, Attorney Robert Van Sciver informed appellant he planned to tell the police about the checks. Appellant does not dispute the propriety of this disclosure. His only complaint concerns Mr. Van Sciver's court-ordered disclosure of appellant's identity.

Communications between attorney and client are protected to encourage the client to fully disclose his problems and circumstances to his lawyer so that he may receive better legal service. This policy is embodied in Utah Code Ann. § 78-24-8(2) (1953), as amended, in Canon 4 of the Code of Professional Responsibility of the ABA, and in the Utah Rules of Evidence, Rule 26:

"Subject to Rule 37 and except as otherwise provided by Paragraph 2 of this rule communications found by the judge to have been between lawyer and his client in the course of that relationship and in professional confidence are privileged, and a

client has a privilege (a) if he is the witness to refuse to disclose any such communication, and (b) to prevent his lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated by the client, or (iii) as a result of a breach of the lawyer-client relationship. The privilege may be claimed by the client in person or by his lawyer, or if incompetent, by his guardian, or if deceased, by his personal representative. The privilege available to a corporation or association terminates upon dissolution."

An exception exists to this rule, which the prosecution showed in the case at bar negated any privilege. Rule 26(2) reads:

"Exceptions. Such privileges shall not extend (a) to a communication if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the legal service was sought or obtained in order to enable or aid the client to commit or plan to commit a crime or a tort. . . ."

The record reveals considerable evidence that appellant sought out Mr. Van Sciver to carry his criminal scheme to fruition. The physical evidence of the checks is the best indication of the criminal character of the activity.<sup>1</sup>

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1 Appellant makes reference to a hearing on his motion to suppress. The transcript of that hearing was in the possession of appellant at the time this brief was filed. Respondent will submit an addendum to its brief which will discuss the hearing on the motion to suppress for the benefit of the court when the transcript of the hearing is available.

The communications uttered between appellant and Mr. Van Sciver which included the appellant's identity, are not privileged for several additional reasons:

1. Rule 26(3) of the Utah Rules of Evidence defines "client" as:

" . . . a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity; and includes an incompetent whose guardian so consults the lawyer or the lawyer's representative in behalf of the incompetent. . . ."  
(Emphasis added.)

Appellant was not a client for purposes of this transaction because he did not consult Mr. Van Sciver for the purpose of retaining him or securing legal service or advice from him in his professional capacity. The appellant did not want legal advice in this case; he merely wanted Mr. Van Sciver to act as a go-between, an agent, for purposes of exchanging the checks for the extortion money. McCormick on Evidence, § 88, p. 179, says that the privilege for communications hinges upon the client's belief that he is consulting a lawyer in his capacity as a lawyer, and on his manifested intention to seek professional legal advice. Further, if the attorney is acting as an agent, the consultation is not privileged nor is the statement

privileged. Banks v. United States, 204 F.2d 666 (8th

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Cir. 1953); Pollock v. United States, 202 F.2d 281 (5th Cir.

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1953). Because appellant had employed Mr. Van Sciver in other, unrelated, civil matters, does not make him a client in every situation, nor does it make every communication between them privileged. The mere fact that the relationship of attorney and client exists between two individuals does not ipso facto make all communications between them confidential. Evans v. Evans, 8 Utah 2d 26, 327 P.2d 260 (1958).

2. Utah Rules of Evidence, Rule 26(3)(b), defines "communication" as follows:

". . .[it] includes advice given by the lawyer in the course of representing the client and includes disclosures of the client to a representative, associate or employee of the lawyer incidental to the professional relationship."

In the case at bar Mr. Van Sciver cannot be said to have given any advice to the appellant that would not be exempted from the privilege under the criminal activity exception, with the possible exception of his calling the appellant the second time at his job to tell him not to try to go through with his plan because the police had the checks (Tr.68,69). The disclosures by the appellant cannot be said to be "incidental to the professional relationship" because there was no professional relationship. The attorney was sought only to act as a go-between in an extortion plot.

3. Appellant also waived any privilege he might have had by discussing the matter and appearing personally in front of third persons. Rule 37, Utah Rules of Evidence, permits the holder of the privilege to waive an otherwise privileged communication. In the instant case, appellant contacted not only Mr. Van Sciver, but also Gilbert Athay (Tr.38). Moreover, when the appellant brought the checks to Van Sciver's office, Randall Gaither was present for at least some of the conversation between Van Sciver and the appellant. Mr. Gaither was not appellant's lawyer, and was, for the purposes of the communication, a third party. If matters communicated to the attorney are revealed to third persons, the element of confidentiality is destroyed. Eg. Clayton v. Canida, 223 S.W.2d 264 (Tex. Civ. App. 1949).

4. This Court has upheld the rule which allows a client to prevent the disclosure of information which he has given to his attorney in order to secure legal assistance. Nevertheless, this Court has also held that the privilege should be strictly construed in accordance with its objective. Jackson v. Kennecott Copper Corporation, 27 Utah 2d 310, 495 P.2d 1254, 1257 (1972). In light of this, appellant in the present case should not be able to claim privilege as to his identity when he was unable to claim privilege as to his conduct.

The object of the criminality exception to the privilege is to remove the protection from conduct which contravenes the promotion of the administration of justice. Respondent submits that strict construction in accordance with this object requires upholding disclosure of appellant's identity.

5. Finally, appellant cites State v. Olwell, 64 Wash.2d 828, 394 P.2d 681, 16 A.L.R.3d 1021 (1964); Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); Ex parte McDonough, 170 Cal. 230, 149 Pac. 566 (1951); and In re Kaplan, 8 N.Y.2d 214, 168 N.E.2d 660 (1960), as authority for his position that Mr. Van Sciver's disclosure of his identity was improper. While these cases do in a general way give support for broadening the privilege to include the identity of the client, the great weight of authority denies the privilege in these cases. McCormick on Evidence, § 90, p. 185, and authorities cited therein. Whether or not to extend the privilege depends on the balance of conflicting policies. One of the policies considered is protection of the public interest. The court in In re Kaplan, supra, upheld an attorney's right to not disclose his client's name where he had previously disclosed the subject matter of his client's communication. The court noted that the public interest was served by the client's exposure of wrongdoing committed by others and ruled his name therefore required protection. The client in Kaplan had not committed any criminal act but feared

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reprisal from those whom he had exposed. Applying Kaplan's reasoning to the case at bar, the public has an interest in exposing the perpetrator of criminal conduct. Appellant was not benefitting the public interest by attempting to use an attorney as a go-between in an extortion plot. He expected to personally profit from his scheme. Unlike the communicant in Kaplan, who was not personally involved in criminal activity, appellant did not serve the public interest through his communications; rather, he hoped to serve his own interests. The public interest in the case at bar required disclosure of appellant's identity.

The communications of appellant which include his identity do not qualify as privileged under any one of several rationales. Appellant attempted to hide behind the privilege to avoid detection for his criminal activities, he abused the relationship with Mr. Van Sciver under the cloak of seeking legal advice, and he himself waived any possible privilege he might have had by discussing the transaction with third parties, individuals with whom appellant does not allege any confidential relationship. In sum, the identity of the appellant was not properly within the type of communications privileged under the attorney-client relationship, and therefore the trial court corrected denied his motion to suppress.

POINT III

APPELLANT'S VOLUNTARY CONFESSION WAS LAWFULLY INTRODUCED INTO EVIDENCE.

After appellant was arrested he was taken to the County Attorney's Office and informed of his rights. He then voluntarily confessed to his criminal involvement. Appellant contends by extended syllogism that:

1. Because Mr. Van Sciver improperly disclosed his identity, appellant was arrested.

2. Because his arrest was allegedly unlawful, his confession should have been suppressed.

3. Because his confession was not suppressed, his constitutional rights have impliedly been denied him.

Appellant cites Wong Sun v. United States, 371 U.S. 471 (1963), and Brown v. Illinois, 422 U.S. 590 (1975), in support of his causal chain. For Wong Sun to apply, evidence must be obtained as a result of an arrest. This threshold consideration has not been satisfactorily met because appellant cannot show the disclosure of his identity was improper. The privilege under the attorney-client relationship is a privilege. It is not a right. The appellant acted inconsistently with one who is entitled to the privilege, as discussed, supra, and he lost it.

Assuming, arguendo, that he did not lose the privilege and that his arrest was illegal, whether the attorney acted improperly would still be a close question.

Brown v. Illinois, supra, requires more than a Miranda warning to attenuate the taint of unconstitutional arrest. Under Brown, the Miranda warning is an important factor in determining whether the confession was obtained by exploitation of an illegal arrest, but temporal proximity of the arrest and the confession, presence of intervening circumstances, and "particularly, the purpose and flagrancy of the official misconduct," id. at 604, are all relevant. Admittedly, in the instant case, not much time lapsed between appellant's arrest and his confession and no intervening circumstances exist to break the causal chain. However, the two factors emphasized by the United States Supreme Court as the most significant: the existence of the Miranda warning and the purpose and flagrancy of the official misconduct, distinguish the case at bar.

1. The record reveals appellant was given a thorough review of his rights and that he waived his rights guaranteed him under Miranda. When he did indicate he wished to talk with a lawyer, the questioning abruptly ended. See Transcript of Statement, Record: 36-41. The appellant does not complain of irregularity as to his Miranda rights.

2. The propriety of Mr. Van Sciver's conduct, if resolved in favor of extending appellant's privilege, would have to be a borderline decision at best. One court has already determined that appellant's identity

was not privileged. Under the authority and reasoning cited in Point II of this brief, it appears a majority of jurisdictions would not extend the privilege to include appellant's identity, particularly in view of the public interest opposing protection. The case at bar clearly does not illustrate misdirected and flagrant official misconduct. If it would be found that Mr. Van Sciver improperly revealed appellant's identity, this determination would reflect reasonable error in judgment. Further, the purpose of the official conduct would have been to benefit the public interest by identifying and apprehending an individual involved in criminal conduct. Under Brown, therefore, appellant's confession would withstand an illegal arrest because the two major factors in determining voluntariness would be satisfactorily met.

Respondent submits, therefore, that whether Mr. Van Sciver properly or improperly revealed appellant's identity, his confession was clearly voluntary under Wong Sun and Brown standards. Because appellant's confession was voluntary, it was properly admitted into evidence.

# CONCLUSION

In view of the foregoing reasons and authority, respondent urges this Court to affirm the findings of the jury and court below.

Respectfully submitted,

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